

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34098

DUSTIN LEE ALAN LOW,)	2008 Unpublished Opinion No. 558
)	
Petitioner-Appellant,)	Filed: July 24, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Gooding County. Hon. R. Barry Wood, District Judge.

Order dismissing petition for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

This is an appeal from an order dismissing a petition for post-conviction relief after an evidentiary hearing. We affirm.

I.

BACKGROUND

The petitioner, Dustin Lee Alan Low, was convicted of rape upon his plea of guilty pursuant to a plea agreement in which other charges of lewd conduct were dismissed. He was sentenced to the custody of the Board of Corrections for a period of twenty years, with ten years fixed as the minimum term of confinement. The sentence was suspended and Low was placed on probation. He later was found in violation of the terms of his probation and the sentence was ordered into execution. The judgment of conviction and sentence were affirmed by this Court in an unpublished opinion, *State v. Low*, Docket No. 32591 (October 10, 2006). On November 15, 2006, Low filed a petition for post-conviction relief. He alleged ineffective assistance of counsel

and claimed six bases for relief: (1) counsel failed to investigate the rape offense because he did not discuss the nature of the charge and the potential penalty with Low; (2) counsel failed to prepare any meaningful defense by not requesting a psychological evaluation either at the pretrial stage or at the probation violation hearing. (3) counsel failed to call favorable witnesses; (4) counsel failed to investigate and to move to suppress statements Low made to a probation officer and to a law enforcement officer without being read his *Miranda*¹ rights, without the signing of a waiver form, and without counsel present; (5) counsel failed to correspond with Low to discuss defenses or options for lower treatment costs, including failing to contact sex offender treatment facilities and drug and alcohol treatment with lower affordable estimates that could have been presented to the court as an alternative to imprisonment; (6) counsel failed and breached legal obligations when he convinced Low to enter into a plea agreement with the State without first investigating the State's evidence through DNA testing to determine whether Low had actually committed the crime of rape.

The State moved for summary dismissal of Low's petition and filed a supporting memorandum addressing all of Low's claims. Low filed an objection to the State's motion asserting he was entitled to an evidentiary hearing. The district court held a hearing on the motion to dismiss. At that hearing, the State addressed each of Low's claims and all of the bases alleged to support those claims. The State asserted, generally, that there was no genuine issue of material fact on any of Low's claims and, specifically, that there was no factual basis to support any of Low's six conclusory assertions for arguing ineffective assistance of counsel and that his request for DNA testing was time-barred and without a factual basis because he did not make a prima facie showing that identity was in issue in his case. In response, Low limited his argument to his claim that his counsel was ineffective by failing to request a psychological evaluation after Low had asked his counsel for such an evaluation. The district court, after listening to argument, concluded that the petition should not be dismissed because a genuine issue of material fact existed at least as to the one issue relied upon by Low at the hearing--Low's request of his counsel for a psychiatric evaluation, which the court found could have been material at Low's sentencing. Accordingly, the State's motion to dismiss was denied.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

The district court subsequently held an evidentiary hearing on Low's petition where Low limited both his presentation of evidence and his argument to the one issue that the court had concluded had a factual concern--whether Low had requested a psychological evaluation and whether he was prejudiced by his counsel's failure to obtain the evaluation. At the conclusion of the hearing, the court dismissed Low's petition. The court reasoned that even if Low had made the request for a psychological evaluation, he was not prejudiced because the record and evidence presented showed that Low had received both a psychological evaluation and a social-assessment prior to sentencing and there was nothing to suggest that Low had a need for another such evaluation. Low filed a timely appeal.

II. DISCUSSION

Low raises a single issue on this appeal. He contends that the district court erred when it dismissed his post-conviction petition because the court determined only the psychological evaluation issue and did not address the other claims alleged in Low's petition. Low requests that the case be remanded to the district court to consider the claims upon which Low did not present any evidence at the evidentiary hearing.

We find Low's argument of error to be without merit. An application for post-conviction relief initiates a proceeding which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). Where an applicant for post-conviction relief declines to present evidence in support of his allegations in his petition at an evidentiary hearing on the petition, it is not error for the trial court to dismiss the petition. *Loveland v. State*, 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005).

It is clear that both at the hearing on the State's motion to dismiss and at the evidentiary hearing held on Low's petition that Low intended to actively pursue only the psychological evaluation issue. By denying the State's motion for summary dismissal, the district court did not preclude Low from later presenting evidence on any of his claims. The record shows, and Low concedes in his appellate brief, that he presented evidence solely on the psychological evaluation

issue at the evidentiary hearing. Low was explicitly asked by his own attorney if this was the “only thing that you claim [trial counsel] failed to do on your behalf.” Lowe responded that it was. At the evidentiary hearing, Low did not address or in any way present evidence regarding any of his other bases for claiming ineffective assistance of counsel. Likewise, Low did not mention or present evidence regarding his request to have the court perform DNA testing. The failure to present evidence to support the allegations of Low’s petition stands alone as a reason sufficient for the district court to dismiss the petition as to those allegations, *Loveland*, 141 Idaho at 936-37, 120 P.3d at 754-55, and Low has not challenged the decision of the district court to dismiss as to the allegation upon which Low chose to present evidence. Under these circumstances, the district court’s order dismissing Low’s petition sufficiently disposed of all issues raised by the petition and addressed at the evidentiary hearing on the psychological evaluation issue. There is no sound reason to remand this case to the district court to consider any claim upon which Low did not present evidence at the evidentiary hearing,

III.

CONCLUSION

The order dismissing Low’s petition for post-conviction relief disposed of all issues raised by the petition. The order of dismissal is affirmed.

No costs or fees allowed.

Judge LANSING and Judge PERRY **CONCUR**.